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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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Case No. 88-5986

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Apellant,

vs.

STATE OF OHIO,

Apellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO
REPLY TO MOTION TO DISMISS OR AFFIRM

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Statement Of The Case

In a section of its Motion To Dismiss Or Affirm entitled "Facts", Appellee recites the allegations contained in the affidavit supporting the search warrant which permitted the search of Appellant Clyde Osborne's apartment. The bulk of the information cited by Appellee has nothing to do with this case or Clyde Osborne but rather refers to an investigation conducted in Florida. The trial judge ruled that all references to the Florida investigation be excluded at trial. (R. 43-44) As is evident from the record of this case, Mr. Osborne was prosecuted only for possession of the four photographs taken from his personal photo album.

Appellee next claims that these "photographs" were marked with the notation, "Tommy-13". (Appellee's Motion, p. 4) In fact only one photograph had this marking, State's Exhibit 1-D. (R. 53). This exhibit was not a polaroid photograph as were Exhibits 1-A through 1-C. (R. 55) This photograph depicted only part of a body from the chest to the knees. (R. 53) It was clearly established at trial that the notation on Exhibit 1-D did not reflect personal knowledge and was not made by Mr. Osborne. (R. 92-93) Although not referenced by exhibit number, it was clearly this partial photograph to which the Ohio Supreme Court referred when it said:

> The majority of the photographs speak for themselves...As possession of these photographs alone would support appellant's conviction , we need not consider whether the state proved the minority of the subject in the sole remaining photograph. (OP. p. 258)

Appellee also notes that a police officer recalled Mr. Osborne saying that the person in the photograph was fourteen years old. (Appellee's Motion p. 4) It was established at trial that Mr. Osborne had no personal knowledge of the person's age and that any comment he might have made regarding the model's age was hearsay. (R. 92) Further, neither the notation on Exhibit 1-D nor the officer's recollection was used as a basis of the Ohio Supreme Court decision. The court explicitly held that the minority of the photographic model was proved by the photographs themselves. (Op. p. 258)

THE Q. .TIONS PRESENTED ARE SUBSTANTIA.

Appellee in section I of its Motion refers this Court to Ohio Rev. Code Sec. 1339.31(K) for a definition of minor (Apppellee's Motion p. 7) That statute defines a minor, for purposes of certain commmercial transactions as one "who has not attained the age of twenty-one years." The statute was not used by the court in reaching its decision and has no bearing on this case.

Appellee claims, in section II of its Motion, that this Court's dismissal of State v. Jordan 665 P. 2d 1280 (Utah Sup. Ct. 1983) appeal dismissed sub nom, Fullmer v. Utah, Case No. 83-5320, 464 U.S. 910 (1983) is dispositive of the question of whether private possession of the materials at issue in this case is constitutionally protected. The statute in Jordan did not prohibit mere possession, but rather the production of child pornography.

Appellee also believes that the dismissal of People v. Geever, 522 N.E. 2d 1200 (Ill. Sup. Ct. 1988) appeal dismissed sub nom. Geever v. Illinois, Case No. 88-381 ___U.S.___; 57 L.W. 3312 (Nov. 1, 1988) is dispositive of this case. The statute in Geever required that possession be "knowing." As has been noted, the Ohio statute contained no element of scienter and has been construed to required only recklessness. (Op. p. 253) This Court has required scienter in order to punish for the production of child pornography. Ferber v. New York, 458, U.S. 747 (1982). It has never addressed the question of whether a lesser culpable mental state can result in punishment for mere possession in the privacy of one's home. The dismissal of Geever is not dispositive of this question.

In section VI of it's Motion, Appellee cites Ward v. Illinois, 431 U.S. 767 (1977) for the proposition that ex post facto application of a narrowing construction of an otherwise unconstitutional statute is consitutuional. (Appellee's Motion p. 13) The defendant in Ward was charged in October, 1971, for violation of a statute which had been authoritatively construed by the state supreme court in 1965. Ward v. Illinois, 431 U.S. at 770-773.

Appellee also refers this Court to Cox v. New Hampshire, 312 U.S. 569 (1941) for the proposition that the ex post facto application of a newly

construed statute is c: titutional where the construc..on is forseeable. (Appellee's Motion p. 13) In Cox convictions were affirmed for parading in the public-streets without a permit. The state court did not alter or interpret the elements of the offense of parading without a permit. The state court found the statute as written constitutional with the possible exception of one clause which was not at issue in the case. State v. Cox 16 A. 2d 508, 513. The issue of the forseeability of a particular construction and the ex post facto application of that construction was not addressed.

CONCLUSION

Appellee has raised no arguments other than those noted above which require any response. Mr. Osborne relies on the law and argument presented in his Jurisdictional Statement.

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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Reply To Motion To Dismiss Or Affirm was served upon the offices of Ronald J. O'Brien, Columbus City Attorney, City Hall, 90 West Broad Street, Columbus, Ohio 43215, and Anthony J. Celebrezze, Attorney General of Ohio, 30 East Broad Street, Columbus, Ohio, 43215, by regular U.S. mail on this 29th day of December, 1988.

S. Adele Shank

S. ADELE SHANK
Counsel for Appellant

88-5986

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Clyde Osborne, being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? YES - Part Time

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

Social Security $250.00 Mo. Title V Program
$268.00 Mo Senior Community Svc Employment Program
(Before Taxes) 1393 East Broad St. Suite 104
Columbus Ohio 43205.
Assigned Goodman Guild 2nd Avenue
Senior Diminlenter Litecam

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Social Security As Mentioned Above.

3. Do you own any cash or checking or savings account?

Yes

a. If the answer is yes, state the total value of the items owned. $75.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

1981 SADARY - $100.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

_____

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Clyde Osborne.
CLYDE OSBORNE

SUBSCRIBED AND SWORN To before me this 19th day of November, 1988.

Mary Carol Peirano
NOTARY

My Commission expires: MARY CAROL PEIRANO
Notary Public
My Commission Expires Dec. 30, 1992